No. 73

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

ADAMS [illegible] COMPANY, *Petitioner*,

vs.

ADDISON WAYNE JONES AND FRANK SMITH, *Respondents*.

## PETITIONER'S REPLY TO THE BRIEF OF THE WAGE AND HOUR ADMINISTRATOR AS AMICUS CURIAE

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## PETITIONER'S REPLY TO THE BRIEF OF THE WAGE AND HOUR ADMINISTRATOR AS AMICUS CURIAE.

### Introduction.

After our reply to Appellee's brief was printed and mailed, we were served with a brief filed as amicus curiae by the Solicitor General on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor. Since this brief treats the issues from a different viewpoint, we deem further reply is warranted. Accordingly we tender herewith our supplemental reply brief. No matter is contained herein save such as is in direct contravention of the brief filed by the Solicitor General above

described. We shall refer to that brief as the Administrator's brief.

The Administator has all but ignored the basic issue in this case. Less than two of thirteen Pages of Argument (pp. 19-20) are devoted to the fundamental question of whether the appellees here are covered by the act at all. Presumably this is because the Administrator is primarily interested in the application of his own interpretations to the one question common to the two cases considered here, viz., "What idle time of these appellees, if any, is to be considered as compensable time?"

This latter question becomes moot if the court holds with the appellant, and decides that the coverage of the act is not sufficiently broad to include employees so far removed from, and having so little responsibility for, production of goods for commerce, as do the appellees here. Therefore, we shall first reply to the arguments of the Administrator upon the question of basic coverage, even though the Administator has treated this question as one of secondary importance.

## The Administrator's Arguments as to Coverage Are Buttressed Upon the False Assumption that One Statement of Fact, and One Legal-Definition, by the Court Below, Were Sound.

### (a) *The evidence shows that the employees here involved are utterly unlike watchmen either as to duties performed or responsibilities assumed.*

The first assumption indulged in by the Administrator is that the Circuit Court's finding that "an auxiliary fireman is not unlike a night watchman," was a finding sustained by the evidence of record. This is not true. The record shows that this plant is completely manned by a staff of watchmen who are not involved in this proceeding. It is that staff of watchmen who perform *all* the duties and assume *all* its responsibilities described in the *Kirschbaum* (310 U. S. 547) and *Walton* (320 U. S. 540) cases.

These appellees are not even permitted access to the plant except when called by the watchmen (R. 13). They watch nothing. They produce nothing. They protect nothing. They have no responsibility for the safety of anything. If we assume the actual production worker to be the center of that area covered by the Act, the non-productive employees described in the *Krischbaum* and *Walton* cases are found in the perimeter of that area of coverage. Entirely *outside and beyond that* perimeter; *still further* removed from the actual production of goods, we find these appellees. Contrary to the finding of the Circuit Court, these appellees are utterly unlike a night watchman, particularly in the degree of responsibility assumed to their employer.

A single parallel will illustrate the point. An employer furnishes desks and tables on which production takes place. Without them, production cannot continue. Obviously employees maintaining these desks are engaged in an occupation necessary to the production of goods for commerce.

But assume that the employer, to gratify some aesthetic whim of his own, hires a man to paint the legs of those tables and desks blue and green, alternating colors twice each week. Concededly the needs of production requires that the desks be maintained and kept serviceable. But production will not be interrupted or affected if a month, or a year elapses without the application of any paint to those furniture legs. Production will not be interrupted nor affected by a change in the color of those furniture legs.

Concededly, such an employee is *working on* an article which is necessary to the production of goods for commerce. But *his work is not "necessary"* to such production.

A striking parallel is found here. Assuming that it is "necessary" to protect a plant from fire, in order to produce goods for commerce, we are faced with the undisputed fact that the *ordinary and usual* means of protecting such plants is the combination of an adequate watching staff with the protection of the City Fire Department. How much added protection shall be supplied rests entirely with the whim of the particular employer.

The court is here confronted with a request that it find that the *de luxe* fire protection which the employer here had elected to provide is "necessary", "essential", "indispensable," to the production of soap, *in the face of the disputed evidence that* soap *is* regularly produced for commerce at *twenty-four* of the largest soap factories in the United States without the "necessity" of any such de luxe degree of fire protection as appellant has elected to provide here.*

It is further confronted with the undisputed fact that the ranking executive officer in charge of production, a Vice President of the company, has no voice in deciding the degree of fire protection to be provided at any plant (R. 20). That matter is determined by an executive officer of the company who has no control of, nor voice in, production of goods in any way; an executive whose duty is to determine the degree of insurance protection which shall be provided at any property of the company. (R. 15, 16, and 20)

Essentially the matter is paralleled in the life of every individual. One home owner decides to provide fire insurance to the extent of but 10% of the value of his house. Another elects to provide 100% coverage. Each weighs the cost of his premium against the possibility of fire and makes his own decision. The insurance department of appellant has exercised the same judgment. The degree of coverage found here is no doubt *desirable*. It is no doubt *economically sound*. But how can it be said that this de luxe protection is "necessary", "indispensable" or "essential" to production of goods when *twenty-four of the largest plants in United States produce identical goods for commerce without it?*

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* Fourteen Procter and Gamble plants (R. 23); five Colgate-Palmolive Peet plants (R. 25), four Lever Brothers plants (R. 21) and at another plant of appellant (R. 19)

(b). *The sole authority cited by the administrator is not in point.*

We think it strange that the Administrator should hurdle the many recent decisions of this Court in which the word "necessary" as *used in this Act* has been defined as "essential", "indispensable" etc., and turn to a decision rendered one and one quarter centuries ago, wherein this Court defined, *not* the word "necessary", but the *phrase* "*necessary and proper*," as used in the tenth Section of the first article of the Constitution, empowering Congress to enact "all laws which shall be *necessary and proper*" for carrying into execution the other powers vested in it by the Constitution.

Even in the ancient decision cited the Court did not assign the Administrator's selected meaning to this word in all cases. The language of Mr. Chief Justice Marshall was, as to the word "necessary". (Emphasis supplied).

> "* * * *frequently* imports no more than that one thing is convenient, or useful, or *essential to another*."
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> "The word 'necessary' is of this description. It has not a fixed character peculiar to itself. It admits of *all degrees of comparison*; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely necessary or *indispensably necessary*."

*M'Culloch v. The State of Maryland, et al.*, 4 Wheat. 316, at 412.

For the reasons stated, in recent decisions this Court has held the word as used in this Act, carries the connotation "*indispensably necessary*", which definition Mr. Chief Justice Marshall concedes to be possible, in the decision relied on by the Administrator.

**The Administrator Has Incorrectly Applied the Facts of Record to His Own Interpretations of the Act. When Necessary Corrections of Fact Are Made, His Brief and Interpretations Entirely Support the Contentions of Appellant as to What Idle Time Constitutes Compensable Time or Time at Work, Within the Contemplation of the Congress.**

That the dispute between Appellant and the Administrator is entirely factual is best evidenced by the fact that each party heavily buttresses its position upon the Administrator's Bulletin No. 13, issued in 1939, and still in effect. We contend that the distinctions made and lines drawn by those interpretation are eminently sound, and deserving of the careful attention of this Court. We understand that the Administrator's position is not different from ours. We emphatically deny the assumption that we have asserted that only hours spent at manual labor constitute work, within the meaning of the Act.

A brief analysis of those interpretations is instructive. In one class, we have the pumper of a strip well, living in the pump house; and the night telephone operator with the switchboard beside her bed. The Administrator's interpretation is that the idle time of such employees is *not* usually to be classed as compensable time at work, within the meaning of the Act.

On the other hand, the administrator points to the chauffeur sitting idle at his employers door, and the messenger boy sitting idle in his employees office waiting to be sent on his next trip. Such time the Administrator rules, is compensable time.

We entirely agree with the Administrator's rulings in these illustrations. Those rulings are, we think, grounded upon two clear cut distinctions, one with regard to the *degree of continuing responsibility* assumed toward the employer, another with regard to the *basic contract of employment*.

The first distinction is specifically pointed out in the interpretations. Referring to the night phone operator and strip well pumper the interpretation states:

> "In the ordinary course of events the employee has a normal nights sleep, has ample time to eat his meals and has a certain amount of time for relaxation and entirely private pursuits."

The mere fact that the employee must stay near at hand in event of emergency, is not controlling, as is established by the next sentence (Emphasis supplied):

> "In *some* cases the employee may be free to come and go during certain periods. Thus, here again the facts may justify the conclusion that the employee is not working at all times during which he is subject to call in the event of an emergency. * * *"

There is scarcely an employee whose services do not involve some idle time. The machine operator experiences intervals when his incoming raw material is delayed, or his production backs up due to improper off-bearing. A stationary engineer may sit in the engine room of his plant reading a magazine all day. But at all times trained ears are listening to the sound of the engines. Trained eyes are continuously watching gauges. Hours may pass during which the engineer does not turn his hands. Yet not one second elapses when those eyes and ears are not functioning in the employers interest. This employee assumes a *continuing responsibility* to his employer.

But let us move this engineer to a house across the street. Let us place in the engine room another set of trained ears and eyes, another employee who assumes this continuing responsibility. The engineer is free to hoe his garden, listen to his radio, sleep or amuse himself as he pleases. His eyes and his ears and all his faculties are his own, to be applied to any purpose he may select.

Under the Administrators interpretation this engineer is *not* at work, merely because he has contracted to be avail-

able in event of emergency. The distinction factually, is found in the *presence of continuing responsibility to his employer in the one case and the utter absence of such responsibility in the other.*

The regulations clearly imply that if the conditions change, and this engineer is continually and constantly interrupted in his personal pursuits he may be regarded as at work even though he may occasionally hoe his garden. Referring to the night telephone operator, the interpretation of the administrator provides this condition:

> "Thus if over a period of *several months*, a telephone operator has been called upon to answer *only a few calls* between the hours of 12 and 5 in the morning a segregation of such hours from hours worked will probably be justified."

This language follows a generalization of the subject in the same paragraph (emphasis supplied):

> "In a few occupations periods of inactivity need not be considered as hours worked even though the employee is subject to call. The answer will *generally depend upon the degree to which the employee is free to engage in personal activities* during periods of idleness *when he is subject to call without* being required to perform active work—*i.e., the frequency with which the employee is called to engage in work.*"

We understand this to mean that in the assumed case of the stationary engineer, living across the street, whether his time is his own (and not compensable) or his employers (and compensable) will depend upon the degree to which his freedom to engage himself as he pleases, in personal pursuits is interfered with by calls from his employer.

Returning now to the two classes of illustrations stated in the interpretations;—the night operator on the one hand, and the messenger boys on the other. Common experience tells us that messenger companies do not hire boys to sit in the office seven hours of their eight hours on duty. Their periods of idleness are sporadic. Those periods may aggre-

gate an hour today and five minutes tomorrow. The general practice is that they are carrying messages. In this respect their situation is similar to the machine operator whose work is occasionally interrupted by a failure in arrival of raw materials. In both cases there is not only a responsibility to the employer to be available for service, but in actual practice that responsibility arises so frequently that idle time approaches zero.

The point is illustrated by contrasting the night telephone operator described in the interpretations (who is "called upon to answer only a few calls between the hours of 12 and 5 in the morning") with the night telephone operator described by the Court in *Strgut v. Garden Valley Telephone Company*, 51 Fed. Supp. 898. There it appeared that although a bed was available, and was occasionally used, conditions were such that the employees continuing responsibility to the employer and the great volume of night calls, prevented any sustained personal activity whatever.

With these distinctions we agree. The Administration has wisely drawn the line between cases where the ability to engage in personal pursuits was trifling, and cases where interference with engagement in personal pursuits in the employer's interest was trifling. In both cases there was a responsibility assumed to the employer. When that responsibility was not sufficiently *constant* to interfere with private affairs, the employee was not regarded as being at work.

The second dividing line existing between the two classifications is found in the nature of the employment contract. The messenger boy and the chauffeur contracted for certain number of hours of service as consideration for a stipulated wage. The contract of the strip well pumper, and the night phone operator covered two phases. First there was the ordinary contract to perform a specified number of hours of service. Secondly there was a contract to *reside in certain proximity to the place of employment for agreed intervals*, and to respond to emergency calls during those intervals. And, as stated before, if those emergency calls

were infrequent: if the employees freedom to do as he pleased was *rarerly* interrupted, such time spent in residence is not to be regarded as time at work.

We think the solicitor has inadvertently contradicted the interpretations of his client. The brief treats *any* interference, even the slightest, with the personal freedom of the employee as "work" within the meaning of the Act. Congress has not so provided. As stated by this Court, Congress used "work" in its commonly accepted sense. Congress did not say that the slightest interference with the employees freedom of action should constitute work as the solicitor implies. The Administrator did not so state as his brief implies he did.

There is no contract of employment that does not carry implied conditions restricting the employer's freedom of action during hours outside working hours. To apply the test adopted by the court below, of "going to the theater" we think grossly unsound. Any employee, residing an hour's ride from his place of employment, where he starts work at 8 P.M., is not free to "go to a theatre" from 7 to 8 in the evening. Yet that hour is not an hour worked merely because he cannot "go to the theatre." Any employee is impliedly required to keep himself able and fit to do his work. This interferes with his personal freedom to become intoxicated in the evening, to the extent that his productivity is affected. Nor has any employee in Washington the freedom to take a trip to New York at will, knowing that he cannot possibly return in time for work the next day. Followed to its logical conclusion the theory produces absurd results.

There remains but to apply the administrator's own interpretations to the undisputed fact of this case. Here are two employees who did not even appear on the premises for three and four twenty-four hour periods in alternate weeks. Conversely, they appeared on the premises only four and three twenty-four hour periods in alternate weeks. During each twenty-four hour period on the premises, they were engaged in active work for 8½ hours. The re-

maining 15½ hours they were free to do as they pleased. Their contract, like the contract of the strip-well pumper and the night phone operator, was to *work* a specified number of hours, and to *live at a specified place* an additional number of hours.

During that 15½ hours they had no continuing responsibility which in any way interfered with their ability to do as they pleased. The sole limitation on their freedom of action arose from their contract to live on premises for 15½ hours every other day.

The degree to which their personal freedom was interfered with during those 15½ hours was infinitesimal. On the average, their sleep was uninterrupted during 29 nights out of every month. Their entire freedom of action was interfered with *once each calendar month*, and then *for the average duration of 45 minutes*. (Computed from R. 28, 29.)

Thus, during the series of 15½ hour periods in residence, occurring during an entire month, their own interests and desires were paramount throughout, save for one 45 minute interval.

We think these facts clearly place these employees in the same class as the strip-well pumper, and as the night telephone operator whose personal affairs were interfered with by "only a few calls between the hours of 12 and 5 in the morning" over a period of several months. These employees were interfered with *once per month*, and then for *forty-five minutes*.

Dated at Washington, D. C., October 11, 1944.

Respectfully submitted,

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